
**IN THE
SUPREME COURT OF MISSOURI**

No. SC85633

**STATE OF MISSOURI, ex rel.
JEREMIAH W. (JAY) NIXON**

Relator,

v.

THE HONORABLE BYRON KINDER,

Respondent.

**Action in Prohibition of the Circuit Court of Cole County, Missouri
The Honorable Byron Kinder**

RELATOR'S SUBSTITUTE REPLY BRIEF

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ARGUMENT

1. The right to counsel is given in a variety of proceedings. Most precedents address the right in criminal prosecutions, where the right is constitutional. This is not, of course, a criminal case; the Sixth Amendment does not apply. Thus Respondent searches for civil precedents. He dwells on one: *State ex rel. Reed v. Frawley*, 59 S.W. 3d 496 (Mo. banc 2001) – a case that addressed not a civil commitment, but extradition, a result of a criminal charge and a practical prerequisite to a criminal proceeding. That appears to be the only instance in which this court has addressed the right to counsel outside of a criminal prosecution.

In *Frawley*, this Court addressed the statutory requirement for counsel in the proposed extradition of a juvenile. The statute there was, in this respect, parallel to the one at issue here. It provided that a person could not be extradited unless he “first be taken before a judge,” who shall inform him “that he has the right to demand and procure legal counsel.” *Id.* at 498, quoting § 548.101, RSMo. 2000 (emphasis omitted). The statute here declares that one alleged to be a sexually violent predator “shall be entitled to the assistance of counsel.” § 632.492, RSMo. 2000. The general civil commitment statute contains a parallel provision. § 632.325, RSMo. 2000 (“If the respondent is accepted for evaluation or for evaluation and treatment pursuant to this chapter, he shall be advised . . . [that an] attorney has been appointed who will represent him before and after the hearing”).

The question in *In the Interest of J.C. Jr.*, 781 S.W. 2d 226 (Mo. Ct. App. W.D. 1989) *State ex rel. Vaughn v. Morgett*, 526 S.W. 2d 434 (Mo. Ct. App. K.C. 1975) *Frawley*, 59 S.W.3d at 499. *Jackson v. Indiana*, 406 U.S. 715 (1972) *Thomas v.*

State, 74 S.W.2d 789 (2002)*State ex rel. Juergens v. Cundiff*, 939 S.W. 2d 381 (Mo. banc 1997)*Frawley*, 59 S.W.3d at 499.

What *Frawley* does not do is answer two other questions, critical here: Does an “ability to assist counsel” requirement accompany the right to counsel in civil commitment proceedings? And what does that requirement mean, in the context of a proceeding that itself is an evaluation of competence – *i.e.*, a proceeding, such as the one the Supreme Court spoke of in *Frawley* that juveniles can never be extradited unless they can assist their counsel may go too far. Apply that rule to a hypothetical in which the six-year-old who recently shot and killed his grandfather in Jefferson City is taken from the State by his parents. The rule would likely entirely bar Missouri from extraditing him, for it seems apparent that no six-year-old would be competent to assist his counsel. Another state may or may not have an interest in, or the ability to take the child and determine whether or how to deal with him.

Missouri law does not omit a solution for the problem created by juxtaposing the need for competent counsel with the need to ensure proper juvenile adjudication or civil commitment of those who are not, themselves, able to assist counsel. The solution is embodied in this Court’s Rule 52.02, which provides for the appointment of a guardian ad litem.¹ In *Frawley*, that due

¹Respondent accuses the Relator of trying to place a guardian ad litem “in the place of counsel to effectively advise and assist” Moyers. Respondent’s Substitute Brief at 20. But the guardian does not “take the place of counsel.” Rather, the guardian assumes the responsibility for assisting counsel. Relator agrees that “[a]ppointment of a guardian does not necessarily make counsel effective if the guardian cannot assist counsel

process requires the court to ignore that possibility and invariably demand that the person himself be competent to assist counsel if civil commitment is to proceed.

Third, Respondent's view sets this case in stark contrast with *Baumruk v. Belt*, 964 S.W. 2d 443 (Mo. banc 1998)*Ex parte Kent*, 490 S.W. 2d 649 (Mo. banc 1973)§ 632.495*Detention of Garrett*, 2003 WL 22673767 (Iowa)

For the reasons stated above and in Relator's opening brief, this Court should order Respondent to proceed to adjudicate whether Jessie F. Moyers is a sexually violent predator.

Respectfully submitted,

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in the preparation of the defense.” Respondent's Substitute Brief at 21. We presume, however, that the court will appoint as guardian someone who *can* assist counsel – most often, a parent or someone else who has knowledge of the person's condition.

Certificate Of Service

The undersigned hereby certifies that a copy of the foregoing brief was mailed, postage prepaid, via United States mail, on this 14th day of January, 2004, to:

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Honorable Byron Kinder
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Certification of Compliance

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule 84.06, and that the brief contains 2,514 words.

The undersigned further certifies that the disk simultaneously filed with the hard copies of the brief has been scanned for viruses and is virus-free.

Assistant Attorney General